

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

EUFEMIA ALAMO RAMIREZ,

Plaintiff,

vs.

FEDERAL BUREAU OF PRISONS,  
Western Regional Office,

Defendants.

Civil No. 08-0976 WQH (CAB)

**ORDER:**

**(1) DENYING MOTION FOR  
APPOINTMENT OF COUNSEL  
[Doc. No. 3];**

**(2) GRANTING MOTION TO  
PROCEED *IN FORMA PAUPERIS*  
[Doc. No. 2]; and**

**(3) DISMISSING COMPLAINT FOR  
FAILURE TO STATE A CLAIM  
PURSUANT TO 28 U.S.C.  
§§ 1915(e)(2) and 1915A**

Eufemia Alamo Ramirez, a federal inmate currently incarcerated at the Metropolitan Correctional Center and proceeding pro se, has submitted a civil action pursuant to the Federal Tort Claims Act (“FTCA”). In Plaintiff’s Complaint, he alleges that he suffered from a slip and fall due to the negligence of employees at the Metropolitan Correctional Center.

Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead, he has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2], as well as a Motion for Appointment of Counsel pursuant to 28 U.S.C. § 1915(e)(1) [Doc. No. 3].

1 **I. MOTION TO PROCEED IN FORMA PAUPERIS [Doc. No. 2]**

2 All parties instituting any civil action, suit or proceeding in a district court of the United  
 3 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28  
 4 U.S.C. § 1914(a). An action may proceed despite a plaintiff's failure to prepay the entire fee  
 5 only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See*  
 6 *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, prisoners granted leave to  
 7 proceed IFP remain obligated to pay the entire fee in installments, regardless of whether their  
 8 action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d  
 9 844, 847 (9th Cir. 2002).

10 Section 1915, as amended by the Prison Litigation Reform Act ("PLRA"), further  
 11 requires that each prisoner seeking leave to proceed IFP submit a "certified copy of [his] trust  
 12 fund account statement (or institutional equivalent) ... for the six-month period immediately  
 13 preceding the filing of the complaint." 28 U.S.C. § 1915(a)(2). Using these certified trust  
 14 account statements, the Court must assess an initial payment of 20% of (a) the average monthly  
 15 deposit, or (b) the average monthly balance in the account for the past six months, whichever  
 16 is greater, and collect that amount as the prisoner's initial partial filing fee, unless he has no  
 17 current assets with which to pay. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4); *Taylor*,  
 18 281 F.3d at 850. Thereafter, the institution having custody of the prisoner must collect  
 19 subsequent payments, assessed at 20% of the preceding month's income, in any month in which  
 20 his account exceeds \$10, and forward those payments to the Court until the entire filing fee is  
 21 paid. *See* 28 U.S.C. § 1915(b)(2); *Taylor*, 281 F.3d at 847.

22 The Court finds that Plaintiff has submitted an affidavit that complies with 28 U.S.C.  
 23 § 1915(a)(1) [Doc. No. 2] as well as a certified copy of his prison trust account statement  
 24 pursuant to 28 U.S.C. § 1915(a)(2) and Civil Local Rule 3.2. Plaintiff's trust account currently  
 25 indicates that he has insufficient funds from which to pay an initial partial filing fee.

26 Accordingly, the Court hereby **GRANTS** Plaintiff's Motion to Proceed IFP [Doc. No.  
 27 2], and assesses no initial partial filing fee at this time. *See* 28 U.S.C. § 1915(b)(1) (court shall  
 28 assess initial partial filing fee only "when funds exist"); 28 U.S.C. § 1915(b)(4) ("In no event

1 shall a prisoner be prohibited from bringing a civil action . . . for the reason that the prisoner has  
 2 no assets and no means by which to pay the initial partial filing fee.”); *Taylor*, 281 F.3d at 850  
 3 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s  
 4 IFP case based solely on a “failure to pay . . . due to the lack of funds available to him when  
 5 payment is ordered.”). However, Plaintiff is required to pay the full \$350 filing fee mandated  
 6 by 28 U.S.C. §§ 1914(a) and 1915(b)(1), by subjecting any future funds credited to his prison  
 7 trust account to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(2).

## 8 **II. MOTION FOR APPOINTMENT OF COUNSEL [DOC. NO. 3]**

9 Plaintiff also requests the appointment of counsel to assist him in prosecuting this civil  
 10 action. The Constitution provides no right to appointment of counsel in a civil case, however,  
 11 unless an indigent litigant may lose his physical liberty if he loses the litigation. *Lassiter v.*  
 12 *Dept. of Social Services*, 452 U.S. 18, 25 (1981). Nonetheless, under 28 U.S.C. § 1915(e)(1),  
 13 district courts are granted discretion to appoint counsel for indigent persons. This discretion may  
 14 be exercised only under “exceptional circumstances.” *Terrell v. Brewer*, 935 F.2d 1015, 1017  
 15 (9th Cir. 1991). “A finding of exceptional circumstances requires an evaluation of both the  
 16 ‘likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se  
 17 in light of the complexity of the legal issues involved.’ Neither of these issues is dispositive and  
 18 both must be viewed together before reaching a decision.” *Id.* (quoting *Wilborn v. Escalderon*,  
 19 789 F.2d 1328, 1331 (9th Cir. 1986)).

20 The Court denies Plaintiff’s request without prejudice, as neither the interests of justice  
 21 nor exceptional circumstances warrant appointment of counsel at this time. *LaMere v. Risley*,  
 22 827 F.2d 622, 626 (9th Cir. 1987); *Terrell*, 935 F.2d at 1017.

## 23 **III. SUA SPONTE SCREENING PER 28 U.S.C. §§ 1915(e)(2) & 1915A**

24 The PLRA also obligates the Court to review complaints filed by all persons proceeding  
 25 IFP and by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused  
 26 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or  
 27 conditions of parole, probation, pretrial release, or diversionary program,” “as soon as  
 28 practicable after docketing.” *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these

provisions, the Court must sua sponte dismiss any IFP or prisoner complaint, or any portion thereof, which is frivolous, malicious, fails to state a claim, or which seeks damages from defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000) (§ 1915A).

Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. An action is frivolous if it lacks an arguable basis in either law or fact. *Neitzke v. Williams*, 490 U.S. 319, 324 (1989). However 28 U.S.C. §§ 1915(e)(2) and 1915A now mandate that the court reviewing an IFP or prisoner's suit make and rule on its own motion to dismiss before effecting service of the Complaint by the U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(2). *Id.* at 1127 (“[S]ection 1915(e) not only permits, but requires a district court to dismiss an in forma pauperis complaint that fails to state a claim.”); *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing 28 U.S.C. § 1915A).

While Plaintiff brings this Complaint pursuant to the Federal Torts Claim Act (“FTCA”), he fails to name the United States as a Defendant in this action. Thus, Plaintiff’s FTCA claims against the individual defendants fail because the United States is the only proper defendant for an FTCA claim against a federal employee for actions taken within the scope of their employment. *See Ward v. Gordon*, 999 F.2d 1399, 1401 (9th Cir. 1993). Accordingly, Plaintiff’s Complaint is dismissed but he will be permitted leave to file an Amended Complaint.

#### IV. CONCLUSION AND ORDER

Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

1. Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2] is **GRANTED**.

2. The Warden of the Metropolitan Correctional Center, or his designee, shall collect from Plaintiff’s prison trust account the \$350 balance of the filing fee owed in this case by collecting monthly payments from the account in an amount equal to twenty percent (20%) of the preceding month’s income and forward payments to the Clerk of the Court each time the

1 amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2). ALL  
2 PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER  
3 ASSIGNED TO THIS ACTION.

4 3. The Clerk of the Court is directed to serve a copy of this Order on Warden,  
5 Metropolitan Correctional Center, 808 Union Street, San Diego, California 92101.

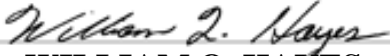
6 **IT IS FURTHER ORDERED** that:

7 4. Plaintiff's Motion for Appointment of Counsel [Doc. No. 3] is **DENIED** without  
8 prejudice; and

9 5. Plaintiff's Complaint is **DISMISSED** without prejudice pursuant to 28 U.S.C.  
10 §§ 1915(e)(2)(b) and 1915A(b). However, Plaintiff is **GRANTED** forty five (45) days leave  
11 from the date this Order is filed in which to file a First Amended Complaint which cures all the  
12 deficiencies of pleading noted above. Plaintiff's Amended Complaint must be complete in itself  
13 without reference to the superseded pleading. *See* S.D. CAL. CIVLR 15.1. Defendants not  
14 named and all claims not re-alleged in the Amended Complaint will be considered waived. *See*  
15 *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). Further, if Plaintiff's Amended Complaint  
16 fails to state a claim upon which relief may be granted, it may be dismissed without further  
17 leave to amend and may hereafter be counted as a "strike" under 28 U.S.C. § 1915(g). *See*  
18 *McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th Cir. 1996).

19 **IT IS SO ORDERED.**

20 DATED: June 19, 2008

21   
22 **WILLIAM Q. HAYES**  
23 United States District Judge  
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